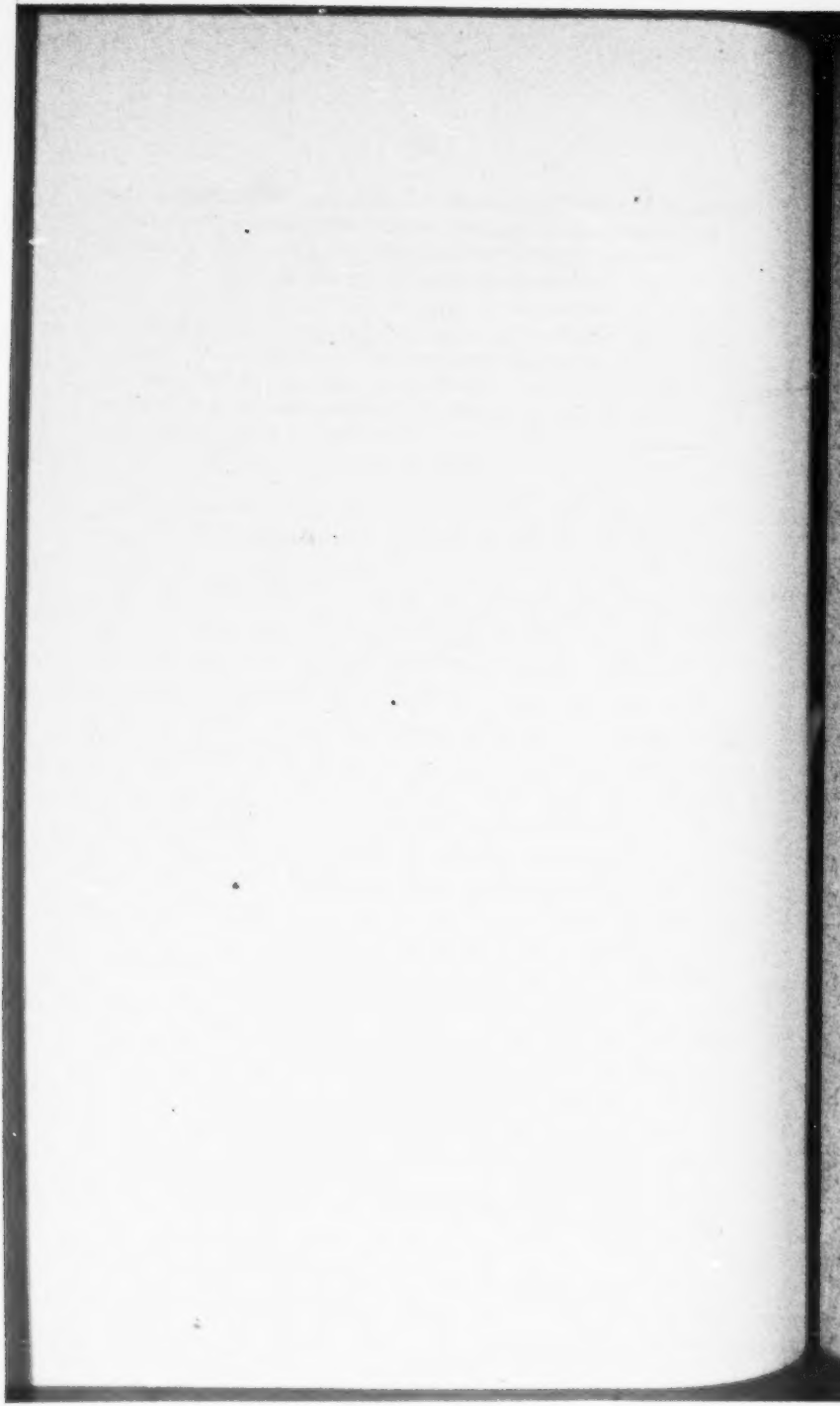

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IN THE

Supreme Court of the United States.

October Term, 1903.

No. 94.

LINDLEY E. SINCLAIR, PLAINTIFF IN ERROR.

vs.

THE DISTRICT OF COLUMBIA.

BRIEF OF DEFENDANT IN ERROR.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for Defendant in Error.

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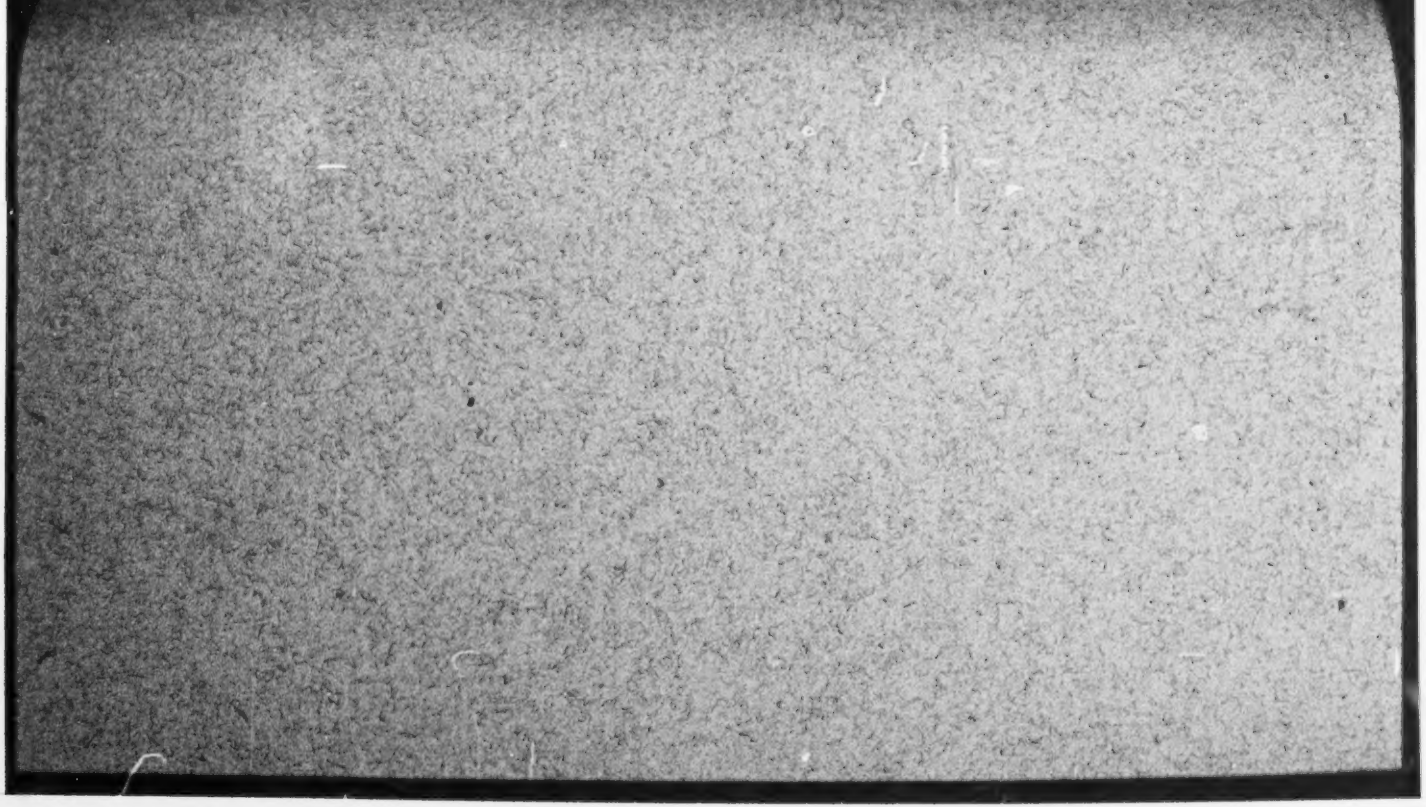

Supreme Court of the United States.

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vs.

THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the defendent in error, The District of Columbia, by its attorneys, and moves the court to dismiss the writ of error in this cause for want of jurisdiction in this court because,

(*a*) The review of the proceedings of the police court of the District of Columbia by the Court of Appeals of said District is final by virtue of the provisions of law giving jurisdiction to said Court of Appeals so to do;

(*b*) This case does not involve any pecuniary matter in dispute and is a criminal case;

(*c*) There is no question involving the validity of a treaty or statute of, or an authority exercised under the United States.

And in addition to the above motion, the defendant in error, by its attorneys, further moves the court to affirm the judgment of the Court of Appeals of the District of Columbia on the ground that the question on which the jurisdiction depends is frivolous.

ANDREW B. DUVALL,
EDWARD H. THOMAS,
Attorneys for the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS.

THE REVIEW OF THE PROCEEDINGS OF THE POLICE COURT BY THE COURT OF APPEALS IS FINAL BY THE ACTS OF CONGRESS.

The police court of the District of Columbia was established by Act of Congress approved June 17, 1870 (16 Stat., 153, R. S. D. C., Sec. 1049) and consisted originally of one judge appointed by the President, by and with the advice and consent of the Senate, for a term of six years.

That Statute provided that:

> "The police court shall have original and exclusive jurisdiction of all offenses against the United States committed in the District not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offenses against the laws and ordinances of the District in force therein."

Sec. 773 of R. S. D. C. provided that:

> "Appeals from the police court shall be tried on the information filed in the court below, certified to Supreme Court by a jury in attendance thereat, as though the case had originated therein, and the judgment of the Supreme Court shall be final in the case."

It has been held that this provision for an appeal did not secure trial by jury within the constitutional requirements where the defendants were charged with conspiracy.

Callan *vs.* Wilson, 127 U. S., 540.

By the Act of March 3, 1891 (Supplement to R. S. U. S., 2d ed., p. 912) provision was made for a bill of exceptions in the police court and that the Supreme Court of the District of Columbia might allow a writ of error upon which the police court was required to "forthwith send up the informa-

tion filed in the cause and a transcript of the record therein, certified under the seal of said court, to said Supreme Court in general term for review and such action as the law may require."

But when the Court of Appeals of the District of Columbia was organized under the Act of February 9, 1893 (27 Stats., 434), no provision was made for review of proceedings of the police court by appeal or writ of error.

By Act of March 2, 1897 (2d Supp. R. S. U. S., 570) provision was again made for writ of error to the police court if a justice of the Court of Appeals "be of the opinion that the same ought to be reviewed."

It is there provided that such writ of error shall issue out of the Court of Appeals addressed to the judge of the police court.

Previous legislation on this subject was superseded by the Code of the District of Columbia.

Sec. 227 of that Code provides:

> "If, upon the trial of any cause in the police court, an exception be taken by or on behalf of the United States, the District of Columbia, or any defendant to any ruling or instruction of the court upon matter of law, the same shall be reduced to writing and stated in a bill of exceptions, with so much of the evidence as may be material to the question or questions raised, which said bill of exceptions shall be settled and signed by the judge within such time as may be prescribed by rules and regulations which shall be made by the Court of Appeals of the District of Columbia for the transaction of business to be brought before it under this section, and for the time and method of the entry of appeals and for giving notice of writs of error thereto from the police court of the District of Columbia; and if, upon presentation to any justice of the court of Appeals of the District of Columbia of a petition which, in the case of a defendant, shall be verified, setting forth the matter or matters so excepted to, such justice shall be of opinion that the same ought to be reviewed, he may allow a writ of error in the cause, which shall issue out of the said Court of Appeals,

addressed to the judge of the police court, who shall forthwith send up the information filed in the cause and a transcript of the record therein, certified under the seal of said court, to said Court of Appeals for review and such action as the law may require, which record shall be filed in said Court of Appeals within such time as may be prescribed by the Court of Appeals, as hereinbefore provided. Any party desiring the benefit of the provisions of this section shall give notice in open court of his or its intention to apply for a writ of error upon such exceptions and thereupon proceedings therein shall be stayed for ten days: *Provided*, That the defendant seeking an appeal shall then and there enter into recognizance, with sufficient surety to be approved by the judge of the police court, conditioned that in the event of a denial of his application for a writ of error he will, within five days next after the expiration of said ten days appear in said police court and abide by and perform its judgment, and that in the event of the granting of such writ of error he will appear in said Court of Appeals of the District of Columbia and prosecute the writ of error and abide by and perform its judgment in the premises. Upon failure of any defendant to enter into the recognizance provided for in this section the sentence of the police court shall stand and be executed; otherwise execution shall be stayed pending proceedings upon his application for a writ of error and until final disposition thereof by the said Court of Appeals."

The police court is not a court of the United States within the meaning of the Constitution.

United States *vs.* Mills, 11 App. Cases D. C., 500.

It is submitted that an examination of the appellate jurisdiction of the Court of Appeals to review the rulings of law by the police judge, depending as it does upon discretion of the justice of the Court of Appeals in the allowance of a writ of error, considered in connection with the limitations attending the right to obtain the writ, such as notice in open court of intention to apply for the same, and other restrictions, and the legislation previously existing on the subject, indicate the intention of Congress to confine the right of review of the

proceedings of this municipal tribunal organized for the trial of minor offenses to the Court of Appeals.

If such be not the true legal solution, then, it seems that, inasmuch as Sec. 227 of the Code of the District of Columbia provides, "*if upon the trial of any cause*" in the police court of the District of Columbia "the United States, the District of Columbia, or any defendant" take exception "to any ruling or instruction," "upon matter of law" followed by the necessary steps to obtain the desired writ of error and it be allowed, every minor offense wherein a question is raised respecting the validity of a statute of the United States or an authority exercised under the United States, including, for example, all police, building and plumbing regulations, whether made by Congress or by the Commissioners of the District of Columbia acting under the authority of Congress, may be reviewed ultimately by writ of error to this court, while, on the contrary, for capital offenses and other crimes, persons indicted and tried in the Supreme Court of the District of Columbia, whose cases are reviewed by the Court of Appeals, cannot secure further review thereof by writ of error or appeal to this court.

In re Heath, 144 U. S. 92.
Cross *vs.* United States, 145 U. S. 571.
Cross *vs.* Burke, 146 U. S. 82.
Chapman *vs.* United States, 164 U. S. 436.

II.

THIS IS A CRIMINAL CASE INVOLVING NO PECUNIARY MATTER IN DISPUTE MEASURABLE BY SOME SUM OR VALUE IN MONEY, HENCE THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS.

The Court of Appeals of the District of Columbia was organized by Act of February 9, 1893 (27 Stats. 434), which Act, by Sec. 8, provides:

> "That any final judgment or decree of the court of Appeals may be re-examined, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

Sec. 233 of the Code of the District of Columbia provides that:

> "Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed or modified, by the Supreme Court of the United States, upon writ of error or appeal; in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

We observe that the jurisdicton of the police court of the District of Columbia is essentially confined to minor crimes and police regulations. The plaintiff in error was prosecuted by information and convicted of violation of an Act of Congress, approved February 2, 1899 (30 Stat. 812), for the prevention of smoke in the District of Columbia (Record, page 1), and was adjudged guilty and sentenced "to pay a fine of fifty dollars, and in default to be committed to the workhouse for the term of ninety days." (Record, page 3.)

This fine is by this judgment a punishment for the offense committed and is not a "matter in dispute," and, in cases such as this, criminal in character, the question is the guilt or innocence of the accused.

U. S. *vs.* More, 3 Cranch, 159.

Sec. 8 of the Act of February 9, 1893, and Sec. 233 of the Code of the District of Columbia are substantially alike.

It was decided, so we understand, in Chapman *vs.* United States, 164 U. S. 436 (L. ed. Bk. 41, p. 504), that the former act referred to cases only where there was a pecuniary matter in dispute, measureable by some sum or value, and referred neither to criminal cases nor to cases where the question was of the guilt or innocence of the accused.

See, also, Cross *vs.* Burke, 146 U. S. 82.

III.

THERE IS NO QUESTION RAISED IN THE RECORD INVOLVING THE VALIDITY OF A TREATY OR STATUTE OF, OR AN AUTHORITY EXERCISED UNDER THE UNITED STATES.

Congress by Act of February 2, 1899 (30 Stat. 812), provided:

> "That on and after six months from the passage of this act the emission of dense or thick black or gray smoke or cinders from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia shall be deemed, and is hereby declared, to be a public nuisance: *Provided*, That nothing in this act shall be construed as applied to chimneys of buildings used exclusively for private residences.
>
> "SEC. 2. That the owner, agent, lessee, or occupant of any building of any description from the smokestack or chimney of which there shall issue or be emitted thick or dense black or gray smoke or cinders within the District of Columbia on or after the day above named shall be deemed and held guilty of creating a public nuisance and of violating the provisions of this act.

> "SEC. 3. That any person or persons violating the provisions of this act shall, upon conviction thereof before the police court of the District of Columbia, be punished by a fine of not less than ten dollars nor more than one hundred dollars for each and every offense; and each and every day wherein the provisions of this act shall be violated shall constitute a separate offense."

It seems reasonably clear that in order to give this court jurisdiction in such case as this the power of Congress to pass the Act of February 2, 1899, and not the mere judicial construction of that Act must be involved.

Baltimore & Potomac R. *vs.* Hopkins, 130 U. S. 210.
District of Columbia *vs.* Gannon, 130 U. S. 227.
United States *vs.* Lynch, 137 U. S. 280.
Glenn *vs.* Garth, 147 U. S. 360.
County of Cook *vs.* Calumet, etc., Co., 138 U. S., 635.
Terry *vs.* County of King, 141 U. S. 668.
U. S. *vs.* Seymour, 153 U. S. 353.
Snow *vs.* U. S., 118 U. S. 346.

We contend that it does not appear directly or by clear and necessary intendment that the power of Congress to pass the Act making the emission of a certain character of smoke in the enumerated cases, a nuisance and punishable by fine, was involved according to the record, and that, therefore, this court will not entertain jurisdiction.

Crowell *vs.* Randall, 10 Pet. 368.

It appears that the principal question submitted to the Court of Appeals was whether there was a variance between the allegation in the information filed in the police court (Record, p. 1) which described the building containing the smokestack used in connection with the furnace as number 213 14th street northwest, in the city of Washington, District of Columbia, and the evidence contained in the Bill of Exceptions (Record, pp. 5 to 17). This also appears from the opinion of Mr. Justice Shepard (Record, pp. 18 and 19).

The District of Columbia contended that there was evidence

sufficient to support the verdict on the point of agreement of this allegation with the proof.

The witness, Wollard, testified (Record, top p. 6) that the smokestack "comes from the center of the building known as 213 Fourteenth street," and that the "premises" or "plant" were connected with that number (Record, p. 5). The plaintiff in error claimed that the building 213 14th street was a separate building from the power station, which had no number on it (Record, pp. 8, 9, and 10). The evidence on this disputed point occupies the principle portion of the Record to the middle of page 11, when the plaintiff in error produced John T. Sullivan as a witness and asked him, "What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke?"

The Record proceeds (lower part of page 11) "To this question counsel for the District of Columbia objected; whereupon counsel for the defendant stated: If the court please, this is a formal proof as to which I concede I think your honor is concluded by the opinion of the Court of Appeals. Of course, it is for you to decide about that. The point I propose is this: This company, under the express or implied license of Congress, or both, has expended a very large amount of money in establishing a plant here in the District of Columbia. It is charged with great public duties. The lighting of the streets of the city is a part of its duty, in addition to the illumination of public and private residences and business houses. It is under a legal obligation to perform this work. It would be liable in damages if it refused. The point that I wish to make is that any act, especially an act passed after a company has been authorized and directed to expend large sums of money in installing costly and important public improvements, which deprives it of the power of using its property, an act which disables it from performing a public duty, for the neglect of which or the failure to perform which it would be liable in damages, would be an unconstitutional act; and if we can prove to the satisfaction of the jury that the emission of such smoke under such circumstances as shown

in this case is absolutely indispensable to the company's enjoyment of its property and to the performance of its public duties which it is obliged to perform, then to that extent the act would be unconstitutional. We offer this testimony in that connection, and we offer to prove the facts to which we refer. Mr. Pugh: To that we object, if your honor please. The Court: Have you anything to say on the matter, gentlemen? Mr. Thomas: We contend, your honor, that that point was expressly passed upon and decided in the Moses case. The Court: The objection is sustained. Mr. Darlington: We except to the exclusion of the evidence; which exception was duly allowed."

Who authorized or directed the company to instal what was called "important public improvements" or to what public authority such company would be responsible for consequential damages, does not appear. It is not pretended that the company had any vested charter rights from Congress disturbed by the smoke law. It does not clearly appear, we submit, that there was by virtue of the smoke ordinance any taking of private property nor any violation of any vested contract right.

This proposition was not, however, presented to the Court of Appeals. The five rejected prayers offered by the plaintiff in error (Record, pp. 13 and 14) raised no question respecting the power of Congress to pass the smoke ordinance.

The 1st and 2d prayers granted on behalf of the District of Columbia (Record, middle p. 12) were rules which the court gave to the jury out of caution by way of prevention of determination of matters of law by the jury.

We submit, however, that these prayers in so far as they may indirectly raise the question of the validity of such police ordinance were correct.

Moses *vs.* United States, 16 App. Cases D. C. 428.

Bradley *vs.* District of Columbia, 20 App. Cases D. C. 169.

That no objection was made in the Court of Appeals on behalf of the plaintiff in error sufficient to raise any justly debatable question respecting the power of Congress to enact

the smoke ordinance, appears from the assignment of errors in that court, which we copy from the brief filed therein by counsel.

"ASSIGNMENTS OF ERROR.

"The police court erred in the following particulars:

"I. In admitting testimony as to the character of the coal used in the power plant building, with the supplying of which coal the appellant was not shown to have, and in fact did not have, any connection.

"II. In excluding evidence on behalf of appellant that such emissions of smoke as were shown in the evidence was indispensable to the company's enjoyment of its property and the performance of the duties which it was legally compellable to perform.

"III. In instructing the jury that, if the appellant had 'an agency in the control of the furnace at the premises mentioned in the information and evidence,' he was an occupant.

"IV. In instructing the jury that, if the defendant was 'the superintendent of the owner of said building mentioned in the information and evidence, and had control of the furnace or of the engineer, or other persons, if any, who operated the same,' he was an occupant.

"V. In instructing the jury that, if the appellant was 'the superintendent of the building situated at 14th and B streets N.W., in the city of Washington, District of Columbia, described in the information as 213 14th street N.W., and known as the plant of the United States Electric Lighting Co.' he was an occupant.

"VI. In refusing to instruct the jury to return a verdict for the defendant.

"VII. In refusing to instruct the jury to acquit unless they believed from the evidence that the defendant was an occupant of the building from the smokestack or chimney of which the smoke referred to in the evidence was emitted.

"VIII. In refusing to instruct the jury to acquit unless they found from the evidence that the appellant was the occupant of the premises described in the information, and

that he participated in or controlled the use of the furnaces or appliances which caused or emitted the smoke.

"IX. In refusing to instruct the jury that they could not infer or find that the appellant was the occupant of the premises from the mere fact that he was known as general superintendent of the Lighting Company, and was a superior officer of the witness Bolton, unaccompanied by evidence satisfactory to them that he was in control of or participated in the operation of the plant which caused the smoke.

"X. In informing the jury that, in New York and elsewhere, power is created by engines, boilers or furnaces, the smoke of which passes through a smokestack, which need not be within half a mile of where the power is applied, or connected with or anywhere near such place, and that this was an illustration which they might use in passing upon the guilt or innocence of the appellant.

"XI. In instructing the jury that they should not acquit although they should find that there was no smokestack attached to No. 213 14th street N.W., the only premises described or referred to in the information."

Respectfully submitted.

ANDREW B. DUVALL,
EDWARD H. THOMAS,
Attorneys for District of Columbia.

Argument on the Merits.

The 5th and 6th assignment of errors, (Brief for Plaintiff in error pages 8 and 9) do not raise any question respecting the validity of the Act of Congress nor of the power of Congress to legislate on the subject. These assignments are claims of mere error in the trial of a criminal cause or *quasi* criminal cause, committed by a police judge.

In the police court and now in this Court, this *quasi* public corporation, seeks to be acquitted on a minor matter. There is, however no error in the record respecting either the evidence or rulings of the police judge.

The third instruction on part of the defendant (Record, p. 13) asked the court to say to the jury in effect that unless they found there was a smokestack on the identical building (which we say was part of the whole plant) of which the defendant was an occupant, they must acquit the defendant.

We observe that the prayer is misleading in that it required the jury to acquit because there might not have been a smokestack or chimney over the very place where the number 213 Fourteenth street was located. We will therefore consider this third prayer in connection with the evidence and further instructions of the court growing out of the question asked of the court by the jury (Record, pp. 14–15), which is as follows:

"According to the information, if we find that there was no smokestack attached to the building No. 213 14th street N. W., then should our verdict be not guilty?"

Counsel for the District of Columbia (Record, p. 15) stated the point to be "whether this building No. 213 is connected with the plant and not whether there is a smokestack or chimney on the identical piece of property No. 213 etc."

Counsel for the defendant replied:

Mr. DARLINGTON: "If the court please, we are there charged with causing smoke to issue from a chimney connected with part of premises No. 213 14th street N. W. Your honor referred to the jury the question whether or not No. 213 14th street was the building with which the chimney was connected and from which the smoke issued. Now, the jury ask you a very plain question. They say, if we find that the smokestack is not connected to No. 213 14th street should our verdict be not guilty? Is any court in the world to say that a man may be indicted or informed against for occupancy of and causing smoke to issue from one building and be convicted for occupancy of and causing smoke to issue from another and different building? The COURT: Gentlemen of the jury, you are the judges of the fact, from the evidence before you, whether the building 213 is a part of the general building in which this power is made and from which the smoke escapes through this smokestack. You have the evidence. It is not for me to say whether the gate which connects 213 with the other premises connects it. You are the judges of the fact, and that is a question of fact for you to determine, and it is for you to determine whether the building from which this smoke is emitted is the building described in the information, having thereto attached the smokestack, furnace, steam boiler, and a stationary engine for some kind of work. 213 is named in the information, but the evidence is before you to determine whether the smokestack is connected with the premises, the emission from which of such smoke violates the law in making the nuisance. That is my understanding of it, and the testimony is before you to determine whether they are the same building or not."

The court finally told the jury (Record, p. 16) that they were not to acquit the defendant if they found there is no smokestack attached to the building 213 Fourteenth street

N.W. (meaning that identical building), and answered, "In the light of all the evidence and the instructions, I say no."

The contention of the defendant's counsel is in effect that this is a variance, while such is not the case, we submit.

We contend that the question is not as to the particular point of location of the smokestack, but is whether under the act of Congress (30 Stat., 812) there was "the emission of dense or thick black or gray smoke from any smokestack or chimney *used in connection with any stationary engine*," etc., and that the words in the second section of the act, "from the smokestack of which (building) there shall issue," etc., refers this case to the point stated (and argued to the jury), whether the building No. 213 is connected with the whole premises.

To have answered "Yes" to the question of the jury would have been a withdrawal from their consideration of all evidence relating to the entirety of the premises and their connection with each other. The case was therefore left to the jury to say whether these premises were one connected premises, and they have answered it in the affirmative by their verdict, and have thus established that there was no variance.

(*a*.) There is evidence to support this finding.

Frank Wollard (Record, bottom of p. 5) testified on cross-examination:

"Q. What observation did you make to determine whether this smokestack of which you speak proceeds from the roof of the building No. 213 Fourteenth street northwest? A. The stack is plainly visible from the top of the District building.

"Q. Yes; but you cannot see the number '213 Fourteenth street' from the top of the District building, can you? A. I afterwards made two visits to No. 213 Fourteenth street

northwest and found the stack that I saw from the roof of the District building was connected with that number.

"Q. How is it connected with No. 213? A. It rises about the center of the building—those premises," etc.

The witness further testified that he does not know that there is a twenty-foot space between 213 Fourteenth street and the power-house with which the smokestack is connected (Record, top of p. 6).

Henry S. Bolton testified (Record, p. 8):

"That the office of the defendant Sinclair was in number 213 14th street northwest, and that this building is across an alley from the plant, but whether it is a private or public alley witness could not say; that there are gates at the entrance to this alley, used to close this alley, extending from the north wall of the power plant to the south wall of number 213 14th street, and that through this alley coal and supplies of different kinds are brought into the power plant, the gates being opened when the carts or wagons come in and closed when they go out.

"Upon cross-examination the witness Bolton testified that the vacant space between the power plant and number 213 14th street is about eighteen feet.

"Upon redirect examination the witness stated that the power station fronts about 120 feet on 14th street and 220 feet on B street, and that it does not include number 213 14th street; that he is speaking of the building containing the machinery and is cutting out the eighteen-foot alley; that the building comprised within said 120 feet on 14th street and 220 feet on B street is the building containing the machinery, and that it is situated at 14th and B streets; that the fence or gates simply run from the north wall of the power plant to the south wall of number 213 14th street,

but connects from building wall to building wall, parallel to the building line of the street where the machinery is. Q. Does not the same fence connect the premises? A. There is a gate across the alley from the building containing the machinery. Q. Does that connect the premises? A. I don't know. Q. Do you know what 'connect' means? A. No. Q. You do not? A. Not in a legal sense. Q. Well, in general, common sense, ordinary sense? A. Why, certainly; there is a gate connecting one building to the other. Q. The premises are connected, then, are they not, in that manner? Mr. DARLINGTON: Connected by a fence between them? Mr. THOMAS: Yes. A. Yes." (Record, p. 9.)

The only witness who attempted to dispute this evidence is James B. Lackey (Record, top of p. 10), who said that the building designated as number 213 Fourteenth street is not connected in any way with the power-plant building.

The weight of the evidence is therefore in favor of the conclusion of the jury; but, whether so or not, the jury were the proper arbiters of the fact of identity and connection, and their verdict is that the premises were connected and substantially the same.

In the light of the answer of the court to the inquiry of the jury, it is believed that the court's illustration is immaterial.

The nuisance is admitted in this case and its existence has also been determined by the verdict of the jury.

That dense black smoke was emitted from the chimney at the plant of the United States Electric Light Company is not a controverted question.

The constitutional validity of the Act of Congress was unquestioned save in one particular, *i. e.*, the right of said Company, by virtue of its supposed public duties, to cause the nuisance untrammeled by legislative restriction.

The capacity of this chimney, wherever located, to create

the nuisance by emission of the prohibited smoke, affords a strong illustration for the necessity of such an Act of Congress.

The record states (middle of page 5) that "the smoke comes from the black, round, iron stack of the U. S. Electric plant and chimney which is attached to thirteen furnaces and boilers and eight stationary engines in the plant of that Company."

The position of counsel in the trial court was that this plant could not be operated without the emission at times of dense gray or black smoke, and it was to the rejection of an offer to prove that fact that an exception was taken (which was apparently abandoned in the Court of Appeals). The question was thus stated:

"What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke?" (Record, middle p. 11.)

An inspection of the prayers granted and rejected will likewise disclose an admitted nuisance and a total absence of any suggested question of want of power in Congress to pass the Act mentioned (Record pp. 12, 13 and 14) unless such question be raised by the prayers granted on behalf of the District of Columbia.

The effect of the failure to controvert the evidence of the existence of dense smoke makes apropos the language of the Supreme Court of Illinois in a similar case.

"Nor will any subtle distinctions be indulged as to what is meant by 'dense smoke,' as those terms are used in the ordinance. The terms used will be understood as commonly employed, and this court will understand by 'dense smoke,' precisely what everybody else does that has ever seen a volume of dark, dense smoke as it comes from the smoke-stack or

chimney where common soft or bituminous coal is used for fuel in any considerable quantities."

Harmon *vs.* City of Chicago 110 Ill. 407.

In the above case it was conceded as a fact that "the effect of 'dense smoke' emitted from a smoke-stack or chimney 'is detrimental to certain classes of property and business within the limits of the City of Chicago, and is a personal annoyance to the public at large within the City'," and the Court added, "*It is a public nuisance, in the midst of a large and densely populated city, whether it is so declared by ordinance or not.*"

Harmon *vs.* City of Chicago 110 Ill. 406.

In the Fifth Baptist Church case, counsel for the Railroad claimed the right to commit the nuisance by virtue of an Act of Congress which it was claimed authorized the construction and use of the building which created the nuisance. A similar contention was made in the police court in this case without the same excusable basis. (See this brief page 9.)

But in the reported case mentioned such contention was answered. The opinion states (Book 27 page 744 L. ed.)

"It admits, indeed of grave doubt whether Congress could authorize the Company to occupy and use any premises within the City limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the Company from liability to suit for damages or compensation, to which individuals, acting without such authority, would be subject under like circumstances."

The Court further said: "There are many lawful and necessary occupations which, by the odors they engender, or the noise they create, *are nuisances when carried on in the heart of a city*, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence

near one's dwelling house would, often render it unfit for habitation.

"It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits."

Baltimore & Potomac R. Co. *vs.* Fifth Baptist Church, 108 U. S. 317, (L. ed. Book 27 p. 745.)

THE EMISSION OF DENSE OR THICK BLACK OR GRAY SMOKE OR CINDERS IS A PUBLIC NUISANCE WHEN OCCURRING WITHIN THE LIMITS OF A POPULOUS CITY.

1 Wood on Nuisances secs. 506 and 507 states:

"In Crump *vs.* Lambert, the defendant erected in the vicinity of the plaintiff's dwelling an establishment for the manufacture of iron bedsteads, containing two blast furnaces, one of which was in constant operation, for the purpose of smelting iron, in which operation coke was burned and lime used as a flux. A large quantity of coal was also used in driving a steam engine and at smith's forges in the factory. The smoke and effluvia passed off through a chimney fifty feet in height, located about fifty-eight yards from the plaintiff's house. Large quantities of smoke issued from the chimneys and settled upon and around the plaintiff's house, and interfered with the comfortable enjoyment of life there. Upon the hearing before Lord Romilly, M. R., the defendant insisted that smoke alone, or noise alone, or noxious vapors alone, would not create a nuisance; but the court said: 'With respect to the question of law, I consider it to be well settled by numerous decisions that smoke unaccompanied with noise or noxious vapors, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property; * * * and the rule upon the

subject is the same, whether it be enforced by action at law or a bill in equity."

"The doctrine of this case has been adopted by the courts of this country, and it may be regarded as well settled that smoke alone, whether accompanied with cinders or not, is a nuisance whenever it is developed in sufficient quantities to interfere with the comfortable enjoyment, physically, of adjoining property."

The case of Crump *vs.* Lambert, referred to in Wood on Nuisances is cited with approval by Mr. Justice Field in his opinion in the Baltimore and Potomac Railroad Company *vs.* Fifth Baptist Church 108 U. S. 317 (L. ed. Book 27 p. 744), "That it is a nuisance, which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him."

Citing Crump *vs.* Lambert L. R. 3 Eq. 409

"It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people. This common knowledge is so generally diffused in Chicago, that no jury could be without it."

Field *vs.* Chicago 44 Ill. App. 410-411.

Harmon *vs.* City of Chicago, 110 Ill. 400.

Coal smoke in large and densely populated cities is productive of much injury to property and annoyance to the inhabitants, while it is not attended with that result in country towns and villages; and it is for this reason that the law treats the subject of an act or ordinance regulating and compelling the consumption of smoke emitted by the burning of coal as a nuisance in cities, and confers on them power to regulate and suppress it within their corporate limits.

Cincinnati *vs.* Miller, 29 Ohio L. J. 364, 365.

See Note 39 L. R. A. 551 where the authorities are collected.

If a jury may infer as a matter of common knowledge that dense smoke is an injury and an annoyance (Field *vs.* Chicago, 44 Ill. App. 410-411) it would seem certain that the courts may infer the same thing.

Facts which are a part of the experience and common knowledge of the day are legitimate grounds for the judgment of the court.

Oppenhiem *vs.* Wolf, 3 Sandf. Ch. 571.

Courts will take notice of whatever is generally known within the limits of their jurisdictions.

Brown *vs.* Piper 91 U. S. 37.

The court will take judicial notice that a thing patented was known and in general use long before the issuing of the patent.

Terlirne *vs.* Phillips, 99 U. S. 592.

King *vs.* Gallun, 109 U. S. 99.

It is a well known rule that there is a strong presumption in favor of the constitutional validity of an Act of Congress and there is also a like presumption that Congress in enacting the questioned law inquired into and duly considered the effect, present and prospective, of the continued emission of dense black or gray smoke upon the safety, health and comfort of the public.

Moses *vs.* U. S. 16 App. Cases D. C., 428.

This Court said in Powell *vs.* Pennsylvania, 127 U. S. at p. 685: "And as it does not appear upon the face of the Statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts."

The same doctrine was approved in United States *vs.* Des Moines & C. Company, 142 U. S. 510. At page 544 the court said: "The knowledge and good faith of the legislature are not open to question. *It is conclusively presumed that a legislature acts with full knowledge*, and in good faith."

THE AUTHORITY OF CONGRESS TO PUNISH OR PROHIBIT ACTS WHICH ARE INJURIOUS TO PUBLIC HEALTH IS NOT LIMITED TO COMMON LAW NUISANCES, AND HENCE THE NATIONAL LEGISLATURE HAD POWER WITHIN ITS DISCRETION TO DECLARE THE EMISSION OF DENSE SMOKE, THROUGH THE STATED MEANS, TO BE A PUBLIC NUISANCE.

"A large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Lawton *vs.* Steele, 152 U. S. 136.

Where town authorities passed an ordinance prohibiting the use of steam as a motive power to propel any street car the ordinance was upheld and such use of steam was declared a nuisance *per se*.

The court said: "In doubtful cases, where the thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question."

North Chicago City R. Co., *vs.* Lake View 105 Ill. 207-212

Nuisances may thus be classified:

First, those which in their nature are nuisances *per se*, or are so denounced by the common law or *by statute*; second,

those which in their nature are not nuisances, but may become so by reason of their locality, surroundings or manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.

The power granted by the Statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those things falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so.

Langel *vs.* City of Bushnell, 197 Ill. 26-27.

"But there can be no doubt of the right of the Legislature to pronounce, under its police power certain things or certain acts nuisances in themselves. Nor are such laws obnoxious to any constitutional provision, because they do not provide compensation to the individual whose liberty to keep or do them is restrained. It may forbid entirely the exercise of certain trades noxious or offensive, or trades which it holds to be such, or permit it under such safeguards as it may prescribe * * * Where anything is declared a nuisance by legislation, it is not competent for a party to show that it is not in fact one. The owner or keeper of intoxicating liquor proved to have been kept for unlawful sale cannot show that such keeping is not a nuisance in fact, when the legislature has declared it to be one. Rights of property are not indeed to be invaded under the guise of police regulations for the preservation of public order, the protection of public health, or to guard against threatened nuisances. If it appears that the real object and purpose of the regulation are other than these, the courts will interfere to protect the just rights of the citizen in his property."

Train *vs.* Boston Disinfecting Co., 144 Mass. 530-531.

The legislature in the exercise of its police power, may prohibit the use of any building in cities or towns of a certain population, for carrying on, without permission of the mayor and aldermen or selectmen, a trade necessary and lawful in itself, but which in its ordinary exercise may become a public nuisance.

Inhabitants of Watertown *vs.* Mayor, 109 Mass. 315.

The court in the above case said:

"But a perversion of this (police) power is not shown by the fact that the business restrained is a necessary and lawful business, *which has not yet become a public nuisance in fact*, or been declared such by the statute. The law most wisely interferes for the protection of the public by preventing in advance threatened and probable injury. Exposure to danger is itself an injury."

Inhabitants of Watertown *vs.* Mayor, 109 Mass. 319.

A statute is constitutional as an exercise of police power which declares any fence unnecessarily exceeding six feet in height, maliciously erected, a nuisance.

Rideout *vs.* Knox, 148 Mass. 368.

The Supreme Judicial Court of Massachusetts per Holmes J. declares that "It is settled that, within constitutional limits, the Legislature may change the common law as to nuisances, and move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property."

Commonwealth *vs.* Parks 155 Mass. 532.

Under its police power the legislature can declare that cer-

tain things are nuisances *per se*, and privy vaults, as described in the statute, are embraced in such things.

Harrington *vs.* Board of Aldermen of City of Providence, 20 R. I. 233.

Where the validity of a statute which declared any dam or obstruction across a water course not provided with a fish way, a public nuisance, the court said:

"Our understanding is that it is the province of the legislature to prescribe what shall constitute a nuisance, within the fundamental limitations upon its authority. One definition of a nuisance is the unlawful use of one's own property, working an injury to a right of another or of the public, and producing such inconvenience, discomfort, or hurt that the law will presume a consequent damage. Wood Nuisances 1; 16 Am. & Eng., Ency. Law 923. The legislature has kept itself within the settled rule; for that the act of obstructing the passage of fish, against individual and public interests, would raise a legal presumption of damage, is too clear to be debatable."

State *vs.* Beardsley (Iowa 1899) 79 N. W. Rep. 138-141.

In the case of Sprigg *vs.* Garrett Park 89 Md. 406 the plaintiff sought an injunction against the town to prevent its interference with a water-tight cesspool which she had constructed at great expense for the reception of excrement and other waste matter. She produced evidence tending to show the superiority of this vault over any other known arrangement or method of disposing of such material. The act incorporating the defendant town gave it full power to regulate such appliances, and in pursuance thereof it passed an ordinance directing the use of water-tight dry earth boxes for these purposes, and prohibiting the construction or maintenance of cesspools similar to plaintiffs. The court held that the ordinance was valid; that the legislature regarded

such structures as plaintiff's a menace to the public health and deemed it essential to prohibit their construction or maintenance. Said the court:

"By whom was it to be determined whether such arrangements would be dangerous to the public health? * * * The record is full of testimony, some of it conflicting in the highest degree, as to whether the vault of the complainants may not become speedily so impaired in strength as that both gas and fluid will leak through its masonry; as to whether such vaults are the best arrangements for the disposal of waste; or whether boxes with dry earth are not more in accordance with the best principles of sanitary science. Who shall have power to decide such matters for the entire population of the town? The power must reside somewhere, so that all may be bound; else,as was said in Mugler *vs.* Kansas, 123 U. S. 623, 'Society will be at the mercy of the few, who, regarding their own appetites or passions only, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please.' 'Under our system,' it is said in the same case, 'that power is lodged with the legislative branch of the Government. It belongs to that department to exert what is known as the police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.' In doing this, however, it cannot treat a thing as a nuisance which cannot be one, *but it may declare that to be a nuisance which from its character, may and does become such*" (citing Baumgardner *vs.* Hasty, 100 Ind. 575; Inhabitants of Watertown *vs.* Mayor, 109 Mass. 697). "'Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated intended convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the

courts. But they must have some relation to these ends.' In the matter of Jacobs, 98 N. Y. 98; Tiedman Limitations of Police Powers, Sec. 122, 122A, 122B; Town of Lake View *vs.* Rose Hill Co., 70 Ill., 191.).

"The statute declares and defines a new species of public nuisance not known to the common law nor declared to be such by any prior statute. But we know of no limitation of legislative power, which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise. (Citing *In re* Jacobs, 98 N. Y. 98; Mugler *vs.* Kansas, 123 U. S. 661.)"

Lawton *vs.* Steele, 119 N. Y. 226–233.

Two propositions of law were announced to the jury in the police court which we assume will be the subject of controversy, first, "that the emission of dense or thick black or gray smoke from any smokestack or chimney used in connection with any stationary engine, steam boiler or furnace of any description within the District of Columbia is a public nuisance." (Prayer No. 1, Record, p. 12) and that the jury are not at liberty to consider the policy of Congress in declaring "the emission of dense or thick black or gray smoke a public nuisance, as defined by the court in prayer No. 1; nor the necessity or supposed inconvenience or hardship, if any, of

such law, and that the policy of enacting such a law is a matter peculiarly and exclusively within the province of Congress, which cannot be disregarded or set aside by either the court or jury." (Prayer No. 2, Record, p. 12.)

If the constitutional objections be those previously urged in Moses *vs.* United States, 16 App. Cases D. C. 428, we affirm that the decision in that case was a correct exposition of the law.

In the Moses case the Court of Appeals per Mr. Justice Shepard said: "The next contention on behalf of the plaintiff in error is, that Congress had not the power to declare the emission of thick or dense black or gray smoke from chimneys a nuisance *per se* and punish the act as an offense, because the effect of the enactment is to deprive persons of their property without due process of law.

As we are not dealing, in this case, with regulations of municipal officers acting under delegated authority, but with an Act of Congress itself, it is unnecessary to review certain cases chiefly relied on in support of the contention; namely, St. Louis *vs.* Hitzeberg, 141 Mo, 375; St. Paul *vs.* Gilfillan, 36 Minn. 298; and State *vs.* Mott, 61 Md. 297. Those cases all involved the construction of the powers delegated to such officers, and it is clear that they would have no power to declare a thing a nuisance *per se* without express legislative authority at least. Yates *vs.* Milwaukee, 10 Wall. 497, 505."

The learned Justice then notices the constitutional provision applicable, and proceeds (page 434): "In a State, the citizen, in addition to the safeguards of its own constitution, is under the special protection of the Fourteenth Amendment; in the District of Columbia (in respect to the right here involved) he is under that of the Fifth." Again it is said (page 434): "In the exercise of this power of regulation, called the police power, there can be no doubt that the legislature has a very wide discretion, and may add to, or subtract from, the category of public nuisances recognized at

common law, moving in either direction, as the exigencies may suggest, under limitations not yet definitely settled." Further on in this opinion this language occurs (page 437): "A nuisance is public or private according to the extent or scope of its injurious effect."

"That which may constitute a private nuisance by reason of special injury to an adjacent or neighboring proprietor, may not amount to a general public nuisance. On the other hand, that may be a public nuisance, affecting injuriously the public or the public interests, whilst not operating a perceptibly special injury to one member of the community more than others.

Now, whilst the emission of the ordinary smoke from the chimneys of houses does not amount to a nuisance *per se*, it is nevertheless a matter of common knowledge, not to be ignored by the courts, that the emission of a volume of dense, black smoke from a single smokestack or chimney of a large furnace, may, under some circumstances, work physical discomfort to the general public coming within its circle of distribution upon public thoroughfares, and may possibly also work injury to public interests in other respects. Whenever it may become a special source of legal injury to an individual he will have an action of damages therefor, and, in cases of continuation, equity will afford complete relief by process of injunction. B. & P. R.R. Co. *vs.* Fifth Baptist Church, 108 U. S. 317, 329; Ross *vs.* Butler, 19 N. J. Eq. 294, 302; Duncan *vs.* Hayes, 22 N. J. Eq. 25.

In a large and growing community, conditions like those suggested and others, might well be apprehended to become widened in distribution, as well as increased in degree, through contributions to the volume of smoke made by other smokestacks or chimneys of like use. Charged with the duty of guarding the public interests, and vested, as we have seen, with wide discretion and liberty of choice in the means adapted thereto, Congress, it must be presumed, inquired

into and duly considered the effect, present and prospective, of the continued emission, constantly or at intervals, of dense black or gray smoke, upon those public interests in respect of safety, comfort and cleanliness.

And it must also be presumed that it apprehended and duly considered the probable injury to, or burden upon, private property, in such case, through the increased expense that may be involved in the use of smoke-consuming appliances, or, in case of their inefficiency, in the substitution of smokeless coal, coke or other fuel for the soft bituminous coal which produces the objectionable smoke.

The policy of adopting a regulation to meet the conditions is a matter peculiarly and exclusively within the province of the legislative department.

The judiciary can only interfere with the exercise of the power where it is manifest that the regulation has no real or substantial relation to objects within the police power, and constitutes a palpable invasion of private right. Powell *vs.* Pennsylvania, 127 U. S. 678, 686; Mugler *vs.* Kansas, 123 U. S. 623, 661; Crowley *vs.* Christensen, 137 U. S. 86, 91.

In the light of the principles stated, the statute does not appear, upon its face, to have been beyond the power of Congress to enact; hence the motion to quash, upon that ground, was rightly overruled.

Nor can we concur in the contention that the proviso, excluding from the application of the act 'chimneys of buildings used exclusively for private residences,' renders the statute void because of inequality and unjust discrimination. And the same may be said as regards the limitation of the prohibited smoke to its emission 'from any smokestack or chimney used in connection with any stationary engine, steam boiler or furnace.'

The Fourteenth Amendment, which prohibits the denial by a State of the equal protection of the law, does not, in its

terms, apply to the legislation of Congress; but, assuming that the same principle is, within the spirit of that and of the earlier amendments, intended to operate upon the legislation of Congress, we cannot regard the discriminations contained in the limitations and proviso aforesaid as having the effect charged.

The only inhibition upon the States is that the classification of persons and things shall not be arbitrary. If there be some reasonable basis for the classification made it is not obnoxious to the charge of denial of equality. G. C. & S. F. Rwy. Co. *vs.* Ellis, 165 U. S. 150, 155; Magoun *vs.* Ill. Trust and Savings Bank 170 U. S. 283, 294.

In the absence of facts sufficient to demonstrate that there can be no substantial distinction between the classes of engines, steam boilers and furnaces named in the act, and those specially excepted, it is not apparent that the classification made is without reasonable basis.

People *vs.* Lewis, 86 Mich. 273.

We can readily apprehend that there may be a very great difference between the quality and quantity of the smoke emitted from the chimneys of private dwellings, and from those connected with engines, steam boilers and furnaces used in buildings devoted to manufacturing purposes, or in the large buildings occupied by many persons, that require an immense consumption of fuel. It may well be that the fuel ordinarily consumed in one class of buildings is quite different from that consumed in the other, and that as a matter of fact the smoke emitted from the chimneys of one class may be injurious to the public and the other not.

The distinction made between stationary engines and portable ones would, on its face, likewise seem not to have an unreasonable foundation.

Probably the only portable engines in use would be fire engines steam rollers, and railway locomotives. Of the two

former it is sufficient to say that they are necessary agencies for the promotion and protection of paramount interests, and are in use for such necessary periods of time and in such places only as exigencies may demand.

The railway engine performs a different function. is confined to a space set apart for its use, and besides is not constantly engaged in diffusing its smoke from a permanent location. It may be presumed that these various conditions were also considered by Congress in the exercise of its discretion in the premises.

Special regulations relating to the uses of railway engines in this and other respects have often been made, and have generally been considered not to violate the rule of equality, because confined to them alone.

In a case following close upon that of Railway Co., *vs.* Ellis, before referred to, the Supreme Court of the United States held that an act of the legislature of New York, regulating the heating of railway passenger cars, was not arbitrary and unequal because railways less than fifty miles long were excepted from its operation. N. Y., etc. R. R. Co. *vs.* New York, 165 U. S. 628, 633."

Moses *vs.* United States, 16. App. Cases D. C. 437-440.

The jurisdiction of Congress respecting the District of Columbia, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the 14th Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the 5th Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.

Wight *vs.* Davidson, 181 U. S. 384.

The United States possesses complete jurisdiction, both of a

political and municipal nature, over the District of Columbia. Parsons *vs.* District of Columbia, 170 U. S. 52.

But whether the constitutional objection to the Act of Congress under consideration be based on the 5th Amendment or the 14th Amendment or on both Amendments, we maintain that the nature of the subject matter precludes any effective argument that Congress in declaring dense smoke a public nuisance acted arbitrarily, and we claim that Congress did no more than *regulate* what in itself in the City of Washington was or might become a serious public inconvenience affecting the health and property of the whole community.

There is no evidence in this case that the plaintiff in error ever made the slightest attempt to comply with the law by properly firing the furnaces by machinery or by hand or that there were any sort of smoke devices connected with the furnaces or that there had ever been expended or lost a single penny by reason of the enactment of this statute. Speaking of the 14th amendment to the Constitution this court said in Barbier *vs.* Connolly, 113 U. S. 27 (L. ed. Book 28 at page 925).

"But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power" to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations

for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet if no discrimination against anyone be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State."

It would seem that the location of the plant of the U. S. Electric Company in the immediate proximity to Public Buildings and frequented and busy streets is a situation which does not permit the plaintiff in error to assert that discrimination contrary to law exists as to him. This question does not affect him however it may be as to others located in the sparsely settled sections of the District of Columbia. An eminent legal author states: "Nor will a court listen to an objection made to the constitutionality of an Act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

Cooley's Const. Lim., side p. 163.

We respectfully submit that if this court has jurisdiction to determine in this case that the Act of Congress of February 2,

1899, is valid as an Exercise of Police Power and that the decision of the Court of Appeals should be affirmed.

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